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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 152

ANNBAR ASSOCIATES, a Co-Partnership, CONTINENTAL BUILDING & OPERATING CO., INC., a Corporation,
Appellants,

vs.

WEST SIDE REDEVELOPMENT CORPORATION, a Corporation, CITY OF KANSAS CITY, MISSOURI, a Municipal Corporation, and NORMAN H. ANDERSON, Attorney General, State of Missouri,
Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellees' Motion to Dismiss or Affirm is based upon a misunderstanding of the four questions set forth in appellants' Jurisdictional Statement, a misstatement of the pertinent facts and a misconception of the applicable law. Turning first to the questions in the Jurisdictional Statement:

1. Appellants ask in Question No. 1 whether the redevelopment statute of the State of Missouri and the redevelopment ordinance of the City of Kansas City, Missouri, being unconstitutional on their face, can be cured, and are they in fact cured by a special ordinance of said City approving a contract between said City and a private corporation (J.S. 4)?*

Appellees say that Question No. 1 is: Did the Supreme Court of Missouri properly construe the Missouri Constitution and said statutes and ordinances (M.D. 3)?

2. Appellants ask in Question No. 2 whether the attacked statute and ordinance require achievement of a public purpose in the first instance, when they actually permit abandonment of a redevelopment plan free from all restrictions *prior* to the assurance of a lasting solution for the public benefit (J.S. 4)?

Appellees say that Question No. 2 is: Do the laws violate the Constitution if they do not provide a procedure for determining whether restrictions are required *after* a public purpose has been accomplished (M.D. 2)?

3. In Question No. 3, appellants ask in the alternative to Question No. 2, if in fact a public purpose is accomplished despite the statutory right to abandon a redevelopment plan with no further restrictions or procedure for determining restrictions simply by constructing a building, then is there not an unconstitutional discriminatory tax relief granted to a purchaser of the redevelopment property who obtains tax relief when he buys said property at a time when no public benefit remains to be served (J.S. 4, 5)?

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*For convenience, page references to the Jurisdictional Statement will be shown as (J.S. .....). Page references to Appellees' Motion to Dismiss or Affirm will be shown as (M.D. .....).

Appellees say that Question No. 3 is: Did the Supreme Court of Missouri properly interpret and construe the questioned laws, and whether said laws permit an evasion of tax relief requirements of other Missouri laws (M.D. 3)?

4. Appellees have the correct understanding of Question No. 4, but argue that it is raised for the first time in this Court (M.D. 23). Appellees are guilty of a mistake of fact. Question No. 4 asks whether the equal protection clause of the 14th Amendment of the Constitution is violated by Ordinance 29352 because a lessee is permitted to evade the earnings restriction justifying tax relief in the event the original redevelopment corporation, West Side, ceases to be the owner? On page 65 of appellants' brief filed in the Supreme Court of Missouri, after the issue was discussed on pages 61 to 65 thereof, the following paragraph is set forth:

> "The foregoing analysis, though explicit, falls short of a more express and conclusive intent to evade. In Point I of Points Relied On, we set forth those paragraphs in the Supplemental Contract which included the words 'successors or assigns'. We pointed out that in paragraphs 20 and 23 thereof, those words were deliberately omitted. The net result of that omission is that only West Side, no successor or assign, is precluded from owning an interest in, or owning all of the lessee corporation. *Further, only with West Side, no successor or assign, will lessee limit its earnings to 8% per annum.*" (Our emphasis).

Other mistakes of fact set forth in the Motion to Dismiss or Affirm should be noted.

Thus, appellees argue that appellants do not contend that the provisions of the Missouri Constitution allowing exercise of the power of eminent domain and tax relief in connection with urban redevelopment projects, are con-

trary to the Constitution of the United States (M.D. 6, 7). It is clear that if said provisions of the Missouri Constitution are construed, and they are so construed, by the Supreme Court of Missouri to sanction the laws herein attacked, obviously appellants have the same objections to said constitutional provisions.

Appellees argue that appellants do not contend that the equal protection clause requires imposition of restrictions beyond clearance of blight and completion of the construction on the project (M.D. 10). Appellants have always contended that the requirement of fulfillment of a public purpose is not satisfied by merely razing the blighted area and building a building on it (J.S. 18-25), but that it is an essential element for the fulfillment of the public purpose:

> ". . . that a redevelopment scheme should be provided calculated to prevent a recurrence of the condition. Consequently, the redevelopment of such areas after they are cleared is but one phase of a comprehensive plan designed to insure an efficient and lasting solution of the problems."
>
> *State* v. *Land Clearance for Redevelopment Authority* (Mo. Sup., 1954), 270 S.W.2d 44, 54.

> "In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented."
>
> *Berman* v. *Parker*, 348 U.S. 35, 75 S. Ct. 98, 103.

Appellees argue that appellants have disregarded the fact that the Supreme Court of Missouri held "that the Missouri urban redevelopment laws require that West Side, its successors and assigns, clear the blight and complete the redevelopment project. . . ." (M.D. 13). (In support of that statement, appellees cite page A-28, Ap-

pendix, J.S.). The reason appellants have disregarded such alleged fact is that it is not a true fact. On pages A-26 and A-27 of the Jurisdictional Statement, the Court states:

> "Sections 353.150, Subd. 4 and 61.230(c) *do permit sale of real property acquired by the redevelopment corporation* for a redevelopment project. But we must consider the whole of the Redevelopment Ordinance in determining whether safeguards or restrictions have been provided to assure that a public purpose will be served. In that connection we may consider the provisions of Sub. Ord. 29352." (Our emphasis).

Appellants recognize, as did the Supreme Court of Missouri, that the "Missouri urban redevelopment laws" do not require that West Side, its successors and assigns, clear the blight. Nor does Sub. Ord. 29352 actually impose such requirement, except in that it approves a provision in a contract between the City and West Side. It is only one provision in said contract that makes such requirement. Thus, the pertinent question is: Can that contract provision cure a fatally unconstitutional deficiency in the urban redevelopment laws; and if it can, does it?

The legal questions raised by appellees are generally stated as follows:

1. Did not the Supreme Court of Missouri decide the questions on an "adequate non-federal basis", thereby depriving this Court of jurisdiction (M.D. 16, 19, 21, 22)?

2. The questions are hypothetical (M.D. 7, 8).

3. Appellants seek a review of the "means" to carry out an admittedly public purpose (M.D. 9-12).

On the first legal question, "adequate non-federal basis", appellees cite *Jankovich* v. *Indiana Toll Road Commission* (1965), 379 U.S. 487, 85 S. Ct. 493 (M.D. 16, 19, 22).

In the *Jankovich* case, this Court held that since the Supreme Court of the State of Indiana held a state statute invalid on the grounds that said statute violated provisions of both the Indiana Constitution and the Federal Constitution, violation of the Indiana Constitution alone provided an independent and adequate ground of decision to deprive this Court of jurisdiction.

379 U.S. 489-492, 85 S. Ct. 494-496.

It is almost foolish to suggest that that case applies to the instant case in which the Supreme Court of Missouri held the questioned statutes valid and not violating either the Missouri or the Federal Constitution. If the laws violate the Federal Constitution, the Missouri Constitution cannot protect them.

The argument that the questions presented by appellants are hypothetical is never fully developed by appellees. The questions are simply called "hypothetical", and then appellees quote from *United States* v. *Raines,* 362 U.S. 17, 80 S. Ct. 519 (M.D. 7, 8). Naturally, appellants agree with the rule of law set forth in the *Raines* case. The point in the instant case is that application of the urban redevelopment statutes and ordinances herein attacked directly and adversely affect appellants. Said redevelopment laws have been acted upon adversely to appellants, who are both taxpayers claiming to be discriminated against by said laws, and competitors who are confronted with the prospect of a competitor receiving discriminatory special favor under said laws.

Appellees argue that Question No. 1 is hypothetical and seek an advisory opinion (M.D. 15); that Question No. 2 demonstrates the hypothetical nature of Question No. 1 (M.D. 17); that Question No. 4 is hypothetical (M.D. 23). But nowhere in appellees' motion is anything said further explaining or justifying the argument.

The questions presented by appellants are not hypothetical. Chapter 353 and Chapter 61 expressly authorize an urban redevelopment corporation to acquire land by eminent domain and then to sell such land at any time without regard to the accomplishment of a public purpose, and the purchaser may own such land free from any of the conditions or restrictions of such chapters (Sec. 353.150-4, App. 76; Sec. 61.230(c), App. 102). Appellants are not attacking said chapters in a vacuum nor asking for advisory opinions on hypothetical fact situations. Said chapters and provisions have been acted upon by appellees. Ordinance 29352 enacted by appellee City of Kansas City, Missouri, pursuant to said chapters, authorizes appellee West Side to acquire land by eminent domain (Articles XVII, XXII, Ordinance 29352, App. 109-111). Said Ordinance 29352 also expressly grants the same power of sale to West Side as is granted by Chapter 353 and Chapter 61 (Paragraph 14, Supplemental Contract, App. 125, 126).

Any valid provisions in the urban redevelopment laws are inextricably tied up with the invalid provisions, as recognized in the *Raines* case (80 S. Ct., l.c. 524). Thus, for one example, the right of sale without doing anything to fulfill the public purpose is permitted by Section 353.150-4 (App. 76). That is a subsection of Section 353.150 entitled "Borrowing of money and giving of security by corporation" (App. 75). Thus, the right of sale, to which objection is made, is an integral, necessary part of the whole urban redevelopment law because it is incident to the contemplated necessity of borrowing money and giving of security. Appellee West Side contemplates mortgage financing (App. 108, 124, 125).

An attempt has been made to cure the unconstitutional defects by the separate contractual agreement between the City and West Side. The question remains whether such

patchwork action can supply constitutional validity, where originally there is no constitutional validity.

In *Wuchter* v. *Pizzutti*, 276 U.S. 13, 48 S. Ct. 259, a New Jersey statute was challenged as violating the 14th Amendment. The statute provided for service of process on a non-resident driver of an automobile by leaving process with the Secretary of State of New Jersey. Notice of the proposed execution of an interlocutory judgment was personally served on the defendant in Pennsylvania. The defendant did not appear. Final judgment was entered. An appeal was taken to the Supreme Court of the United States. Mr. Chief Justice Taft delivered the opinion of the Court, stating on page 262 (48 S. Ct.):

> "But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause *and such notice was not required by the statute. Not having been directed by the statute it cannot, therefore, supply constitutional validity to the statute or service under it* (Many cases cited)." (Our emphasis).

The Supreme Court thereupon reversed the judgment for the plaintiff, holding the New Jersey statute unconstitutional despite the evidence that the defendant had actual notice by service. Similarly, in the instant case, the contractual provision between the City and West Side requiring completion of the project in any event cannot give validity to laws which not only do not direct such completion prior to sale, but expressly permit sale without restrictions prior to completion.

Furthermore, appellants claim that such contractual provision between the City and West Side that "West Side, its successors and assigns shall complete . . ." the redevelopment construction does not cure the unconstitutional power of sale without restrictions provided in Chapter 353, Chap-

ter 61 and Ordinance 29352. Such contractual provision between West Side and the City is not binding on a purchaser who has made no contract with the City, received no special ordinance or certificate of necessity, and who has no notice of any restrictions on use of the property, because there are no covenants running with the land recorded in the Office of the Recorder of Deeds.

Appellants do not seek a review of the "means" adopted to carry out an admittedly public purpose. Appellants contend that a law which permits the taking of property by eminent domain for a public purpose and at the same time permits sale and ownership of that property free from all restrictions on use and without requirement of achievement of such public purpose, is the equivalent of a law authorizing the taking of property by eminent domain without any public purpose or benefit, in violation of the equal protection clause of the Federal Constitution.

Appellants take no issue with the principle stated in *Berman* v. *Parker* (1954), 348 U.S. 26, 75 S. Ct. 98, that "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." (348 U.S. 33; 75 S. Ct. 103; M.D. 9). In the instant case, however, the "means" of eminent domain have been granted to appellee West Side without a permissible object or public purpose, because no public purpose is required to be accomplished. The laws attacked not only fail to provide any "means" or "restrictions" to assume accomplishment of a public use or benefit for land taken by eminent domain, but they expressly and affirmatively provide for abandonment of all restrictions and the public purpose or object which justified use of the "means" of eminent domain in the first place.

A redevelopment law which provides in advance that upon clearing of the area and completion of redevelopment construction, if any, the land may be owned free from all restrictions and without regard to the public purpose or benefit, does not provide for a public purpose to justify exercise of the power of eminent domain, because it does not assure removal of blight for any period beyond the time taken to clear the area and perhaps erect a structure thereon.

Appellees infer that if the Missouri laws attacked herein are unique, the questions presented by this appeal are not substantial and not of national importance (M.D. 13). Although almost every state has an urban redevelopment law providing for redevelopment of blighted areas through a public authority or agency with continuing supervision by such public authority or agency, only ten states have laws providing for private redevelopment corporations, and of these, only Missouri permits sale of redevelopment property without continuing supervision by a public authority or agency in the public interest. Other states are enacting and amending and will enact and amend private redevelopment corporation laws. Whether these states are to be permitted to pattern such laws on the unique laws of Missouri or are to be required to have direct public supervision over and continuing restrictions on such private redevelopment corporations and the sale of redevelopment property, in the public interest, is a substantial federal question. Whenever the property of a private citizen is taken by the power of eminent domain for the private gain of another citizen under the guise that the taking is for a public benefit, a substantial federal constitutional question is involved. Whenever discriminatory tax benefits are given to one private citizen as against

other taxpaying citizens, under the guise that a public benefit will be achieved, when in fact there is no requirement for achieving such public benefit, a substantial federal constitutional question is directly involved. Those are the questions in the instant case.

In answer to this, appellees argue that the Supreme Court of Missouri's decision rests on a non-federal basis, which argument is patently unsound as hereinbefore shown. Appellees argue that the Supreme Court of Missouri relied on the Constitution of the State of Missouri and not the equal protection clause of the 14th Amendment (M.D. 21, 22). For this authority, they cite J. S. 33, 34 and quote therefrom. Immediately following the quotation appellees set forth, the Supreme Court of Missouri in its opinion states that the provisions attacked "do not conflict with the equal protection clause of either constitution", referring to the Missouri Constitution and the Constitution of the United States (J.S. 34).

Urban redevelopment in all of its phases represents a vast and necessary sociological and economic activity throughout the nation. It will be with us for many years to come. As sound as it may be sociologically and economically, and even philosophically, guidelines from this Court are of substantial federal importance to assure that such redevelopment laws are sound legally.

Wherefore, appellants request the Court to overrule appellees' Motion to Dismiss or Affirm.

Respectfully submitted,

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